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In the District Court of the United States for the Western District of Louisiana, Shreveport Division

Civil Action No. 1488

AUSTIN F. AKIN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees United States of America and Interstate Commerce Commission, pursuant to Rule 12 paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered September 17, 1945, of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission. Appeal was allowed on November 9, 1945, and appeal papers were served on November 14, 1945.

[1] The District Court also entered findings of fact and conclusions of law, and wrote an opinion.

The Commission's order,[2] dated October 21, 1944, denied appellant's application made under the "grandfather" clause of Section 206(a) of Part II of the Interstate Commerce Act (49 U. S. C. 306) for a certificate authorizing operations as a common carrier by motor vehicle of general commodities, with exceptions not here important, between Fort Worth, Texas, and New Orleans, Louisiana, over highways designated in the application, and service to all intermediate points, including Dallas, Texas, and Shreveport, Louisiana, and to several off-route points.[3]

The Commission found in its report that appellant has transported continuously since 1934 ap-

[2] The Commission also issued a report on October 21, ,1944, which was made a part of the order by reference. The report and order here attacked (not to be printed in full in the permanent series of Motor Carrier Reports of the Commission) were issued on further hearing after an earlier report by Division 5 was set aside at the request of protesting carriers. The Commission found in the prior report that appellant was entitled to a certificate as a common carrier authorizing operations between Fort Worth, Texas, and New Orleans, Louisiana, upon condition, however, that he surrender for cancellation permits authorizing contract carrier operations which had been issued previously. Appellant elected to receive the certificate and surrender the permits for cancellation. However, the report was set aside on March 13, 1943, and appellant has retained the permits..

[3] It appears from Exhibit "D", attached to and made a part of the complaint, that appellant has assigned his right under the "grandfather" clause of Section 206(a) of the Act to continue the common carrier operations embraced by the application here involved for a period of four years, beginning March 31, 1944, for which appellant will receive $28,800, subject only to denial of his application by the Commission.

proximately 250 different commodities between Fort Worth and Dallas, on the one hand, and, on the other, New Orleans, and from Fort Worth and Dallas to Donaldsonville, Shreveport, Alexandria, and Baton Rouge, Louisiana, pursuant to a written contract with Swift and Company. The Commission further found that an order was issued by it on October 12, 1938, granting appellant, under the "grandfather" clause of Section 209(a) of the Act (49 U. S. C. 309), a permit authorizing continuance of these operations as a contract carrier, and that additional permits were issued to appellant from time to time thereafter, authorizing extension of his operations as a contract carrier, principally for Swift and Company. It was also found in the report here attacked that appellant received a permit from the Railroad Commission of Texas in 1934, authorizing operations by motor vehicle as a contract carrier of packing-house products in interstate commerce for Swift and Company.

Notwithstanding the facts that he has voluntarily continued and is authorized by the Commission, to perform operations as a contract carrier, appellant's attack upon the order, as appears from the Assignment of Errors, is predicated principally upon the contention that the Commission erred in excluding and refusing to consider, in the common carrier proceeding, evidence showing the nature and extent of his contract carrier operations prior to, on, and after

June 1, 1935. More particularly, appellant asserts that all of his operations, including the contract carrier operations, were performed at the same times, in the same vehicles, over the same routes, and between the same points; that, by reason of those circumstances, he was conducting only one motor carrier operation prior to, on, and after June 1, 1935; that the Commission erred in refusing to consider the common and contract carrier services of appellant as a single operation; and that the Commission erred in refusing to hold that the services alleged to have been conducted as a single operation were common carriage.

Appellees United States of America and Interstate Commerce Commission submit that the appeal presents no substantial question and that the decree of the District Court should be affirmed without argument.

The question for decision by the Commission was whether appellant was engaged in "bona fide operation" as a common carrier by motor vehicle on and continuously after the critical date of June 1, 1935. It is well established that the Interstate Commerce Act is remedial and is to be construed liberally, and that the "grandfather" clause of Section 206 (a) of the Act is to be read in harmony with the purposes of the measure and extends only to carriers plainly within its terms. *McDonald* v. *Thompson,* 305 U. S. 263, 266. Only substantial parity between

future operations and prior bona fide operations is contemplated. *Alton R. Co.* v. *United States,* 315 U. S. 15, 22. There is a basic distinction between common carrier and contract carrier operations, and the "grandfather" clause of Section 206 (a) of the Act may not be utilized to enlarge and expand a carrier's business beyond the pattern which it had acquired prior to June 1, 1935. *Noble* v. *United States,* 319 U. S. 88, 92.

Even though it be assumed that appellant's common and contract carrier operations were performed as he alleges, such a fact affords no rational basis for the contention that the Commission erred in excluding and refusing to consider evidence of appellant's contract carrier operations in the common carrier proceeding. The elementary distinction between a common carrier and contract carrier, as the terms are defined in Section 203 of the Act (49 U. S. C. 303), is that the former is a carrier which holds itself out to the general public to transport for compensation whereas the latter is a highly specialized carrier which transports for compensation under individual contracts or agreements. *Noble* v. *United States,* 319 U. S. 88, 91, 92. Manifestly, evidence of appellant's contract carrier operations had no pertinent relation to the nature and extent of appellant's common carrier operations, which was the question for decision by the Commission.

Although no question under Section 210 of the Act (49 U. S. C. 310), relating to dual operations,

is presented in this case because the certificate sought by appellant was denied, reference to Section 210 and the decisions of the Commission thereunder makes clear that the Interstate Commerce Act contemplates that one person may perform common and contract operations over the same routes or within the same territory. See *Baggett Transportation Co.*, 29 M. C. C. 103, 107; *Lichtenthal Extension of Operations*, 3 M. C. C., 46, 47–48; *Capitol Motor Lines*, 9 M. C. C. 86, 88; *Consolidated Freight Lines*, 9 M. C. C. 305; *Levinbery Common Carrier Application*, 10 M. C. C. 489; *Perkins*, 30 M. C. C. 1; *Milstead Contract Carrier Application*, 11 M. C. C. 157; *Salt Lake Transfer Co.*, 12 M. C. C. 43; *Bessie S. Kojec*, 13 M. C. C. 167; *Chatterton Application*, 13 M. C. C. 357; *Robert E. Mack*, 26 M. C. C. 581; *Cole Teaming Co.*, 16 M. C. C. 429, 435; *M. Moran Transportation Lines*, 23 M. C. C. 139, 148, see *Ziffrin, Inc.* v. *United States*, 318 U. S. 73. The fact that common and contract carrier operations are performed by one person at the same times, in the same vehicles, over the same routes and between the same points does not destroy the elementary differences between the two services; the basic differences, as heretofore noted, are found in the characteristics of common and contract carriers.

Nor did the District Court or the Commission err in refusing to hold that appellant's services, in their entirety, were exclusively those of a common carrier. Appellant voluntarily chose, and is

authorized by the Commission, to perform contract carrier operations.[4] Appellant may continue to perform those operations, whatever may be the outcome of this controversy. Hence, appellant should not be permitted to complain because the District Court and the Commission refused to aid him in an attempt to convert the contract carrier operations to common carrier operations. Issuance of a certificate as a common carrier embracing appellant's contract carrier operations would distort his prior operations, which was condemned in *Noble* v. *United States,* 319 U. S. 88, 91, 92.

The other grounds upon which appellant predicates his appeal present no substantial question. Nothing could be more firmly established than the proposition that to constitute bona fide operation under the "grandfather" clause of Section 206 (a) of the Act, substantial service must be furnished by the carrier. Mere "holding out" is not sufficient. Service must be actual rather than potential or simulated. Service which is incidental, sporadic, infrequent, or merely nominal, is not enough. *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 480, 841; *Alton R. Co.* v. *United States,* 315 U. S. 15, 23. The burden is upon an applicant to establish his right to the statutory grant under the "grandfather" clause of Section 206 (a) of the

[4] In fact, the District Court, in its opinion, expressed the view that appellant's decision to seek a certificate as a common carrier had the appearance of an afterthought.

Act. *Alton R. Co.* v. *United States, supra,* p. 25. Determination of controverted questions of fact is entrusted by Congress to the Commission. *United States* v. *Maher,* 307 U. S. 148, 153–154; *Loving* v. *United States,* 32 F. Supp. 464, 467 (W. D. Okla.), affirmed, 310 U. S. 609. The credibility of witnesses and the weight of evidence in matters before the Commission are for it to determine; and its findings of fact will not be disturbed by the courts if supported by evidence. *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 508; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 484; *United States* v. *Pan American Petroleum Corporation,* 304 U. S. 156, 158; *C. R. I. & P. Railway* v. *United States,* 274 U. S. 29, 33–34; *Assigned Car Cases,* 274 U. S. 564, 580; *Transamerican Freight Lines* v. *United States,* 51 F. Supp. 405, 410 (D. Del.).

The report herein assailed shows that the Commission applied the proper criteria to appellant's application. The basis for the Commission's action in denying appellant's application for a certificate as a common carrier is indicated by the following statement from its report:

> *Discussion and conclusions.*—Applicant takes the position that only a few of the shipments allegedly transported prior to June 1, 1935, have been controverted and that these few shipments may be disre-

garded as of no probative value without affecting the grant of the application. He proceeds on the assumption that the remaining shipments are entitled to full faith and credit because they have not been disproved. This assumption is invalid, however, since the burden of proof rests upon applicant to establish the authenticity of the documentary evidence upon which he relies. Protestants discredited much of this evidence and applicant admitted that he could not separate the supporting documents to show the originals from the copies. In view of the doubt cast upon the authenticity of the documentary evidence, this evidence was given little weight by the joint board which conducted the hearing and observed the demeanor of the witnesses. We agree with the joint board that applicant has failed to establish that he was engaged in "bona fide" operations as a common carrier on and prior to June 1, 1935.

Even if we assume that applicant's documentary evidence is authentic, his showing for the period immediately following the statutory date remains deficient. In the 13 month period from June 1, 1935, to July 1, 1936, only five common carrier shipments are shown on Exhibit No. 26 whereas 75 such shipments are shown in the 8 month period from October 1, 1934, to June 1, 1935. Such a large decline in the number of shipments transported subsequent to the statutory date indicates a

virtual cessation of applicant's claimed common carrier operations during this critical period. These few shipments, obviously are insufficient proof of a good-faith service over the 539-mile route between Fort Worth, Dallas, Shreveport, and New Orleans as these four cities, respectively, have populations of approximately 178,000, 295,000, 98,000, and 495,000. No explanation is offered for this lack of substantiality and continuity of service and hence, this defect alone would warrant denial of the application even if the evidence for the prior period was unquestioned.

Furthermore, the manner in which applicant's common carrier operations were conducted tends to negative his claim of a good-faith service. These operations were so small in comparison with applicant's principal service as a contract carrier of packing-house products as to warrant the conclusion that they were merely a "side line", particularly since many of the shipments shown for the prior period consisted of commodities purchased by his drivers under personal arrangements with the shippers. Although applicant claims a "holding out" to serve the general public, he did not advertise his service or have a business telephone or terminal in his own name where ordinary shippers could obtain his service. On the contrary, most of his common carrier shipments were transported for only two or three shippers in 1937, 1938, and 1939, the only years in which any ap-

preciable number of such shipments was transported since the statutory date.

Upon consideration of the manner in which applicant's common carrier operations were conducted and the aforementioned defects in his documentary evidence for the periods immediately prior and subsequent to June 1, 1935, we do not believe that he was engaged in "bona fide" operations as a common carrier during these critical periods. Our authorization of such operations in the prior report was based on applicant's evidence, standing alone, but this evidence has been discredited by protestants as discussed herein. We conclude, therefore, that our prior findings should be reversed and that the application should be denied.

Findings.—Upon further hearing, we find that applicant has failed to establish the right to a certificate under the "grandfather" clause of section 206 (a) of the Interstate Commerce Act, authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities between the points claimed in the amended application, and that such application should be denied.

The District Court did not commit error in refusing to enter additional findings of fact based upon the evidence before the Commission. Appellant apparently misconceives the function of district courts in cases of this kind. District courts may not substitute their judgment for that

of the Commission in respect of matters which have been entrusted by Congress to the Commission. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286; *Manufacturers' Railway Co.* v. *United States*, 246 U. S. 457, 483; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547–548; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 135. The judicial function is exhausted when there is found to be a rational basis for the conclusions of the Commission. *Rochester Telephone Corp.* v. *United States, supra*, p. 146.

The District Court held that the burden was upon appellant to prove by a fair preponderance of the evidence, independently of evidence of contract carrier operations, that he was entitled to a certificate as a common carrier under the "grandfather" clause of Section 206 (a) of the Act; that the Commission correctly excluded documentary and other evidence of appellant's contract carrier operations in passing upon his application for a certificate as a common carrier; and the the Commission's conclusion that appellant had failed to discharge the burden of showing that he was entitled to a certificate as a common carrier under the "Grandfather" clause of Section 206 (a) of the Act was supported by the record made

before the Commission. It is submitted that the District Court's conclusions are correct and should be sustained.

For the foregoing reasons, it is clear that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
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NOVEMBER 1945.

Filed November 29, 1945,
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U. S. District Court,
West. Dist. of Louisiana.

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